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IN THE

# Supreme Court of the United States

October Term, 1924.

NO. 680

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MARIANO VIAMONTE FERNANDEZ, *Appellant*,

*vs.*

PERLEY B. PHILLIPS, Marshal of the United States for the District of New Hampshire, *Appellee*.

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Appeal from the District Court of the United States for the District of New Hampshire.

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## BRIEF FOR THE APPELLANT.

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### STATEMENT OF THE CASE

This is an appeal arising out of a petition for habeas corpus and certiorari filed by the appellant in the United States District Court for the District of New Hampshire. On complaint made before Hon. George F. Morris, Dis-

trict Judge, a warrant was issued on March 27, 1924, on which the appellant was taken into custody. In substance this warrant alleged on information or information and belief that "one Marino Viamonte Fernandez * * * is duly and legally charged by the United States of Mexico with having in the city of Mexico within the United States of Mexico, committed the crime of embezzlement or peculation of the public funds"; that embezzlement or peculation is a crime in said Mexico; that the Mexican government had made requisition for the said Fernandez and that said Fernandez was a fugitive from justice then residing at Newton in the said district of New Hampshire. The complaint came on for hearing on April 10th before the Hon. James A. Lowell, District Judge, sitting by special assignment. A motion to dismiss the complaint, because the appellant had upon a similar complaint after full hearing before Elwin L. Page, United States Commissioner, been discharged because probable cause was not shown, was denied. (Record, p. 10.) The evidence introduced at the hearing consisted chiefly of the copy of *ex parte* proceedings alleged to have been held before a Mexican court, as a result of which a warrant was issued for the apprehension of one Mariano Viamonte. (Record, p. 7.) At the close of the hearing a formal motion was entered for the appellant's discharge (Record, p. 13), on the grounds (a), That the complaint was insufficient; (b), that there was no competent legal evidence of the requisition, and (c), that there was no competent legal proof that respondent had committed an extraditable offence. These grounds are more particularly stated in the motion. (Record, p. 13.) The motion was denied and the appellant was held for extradition. Thereafter, on April 22, 1924, the appellant filed his petition for writs of habeas corpus and certiorari. The writs were issued and hearing was

held before Hon. George F. Morris, District Judge. At the conclusion of the hearing the appellant filed a motion for his discharge. Briefly summarized the grounds set forth in the motion for the appellant's discharge were (a), that the complaint was insufficient; (b), that there was no sufficient requisition; (c), that there was no legally competent evidence that the appellant had committed an extraditable offence, and (d), that upon the record the appellant ought to be discharged. (Record, p. 171.) On June 2, 1924, the District Judge filed a rescript denying relief on the ground that "one district judge has no jurisdiction to overrule the decisions of another district judge sitting in the same district." (Record, p. 172.) On June 7th a further rescript was filed vacating the previous order and dismissing on the merits the appellant's petition and remanding him to the custody of the Marshal to be held for extradition. (Record, p. 172.) From this judgment dismissing the appellant's petition upon the merits this appeal was prosecuted. The record includes all the material pleadings and all the evidence.

## SPECIFICATION OF ERROR.

The appellant's specification of error will, so far as practical, be based upon the appellant's motion for his discharge. (Record, p. 171.) The error relied upon is as follows:

1. The complaint and warrant upon which the appellant was arrested are fatally defective:

(a) The complaint does not allege that the appellant has committed any extraditable offence or crime;

(b) The alleged offence is not fully and plainly sub-

stantially and formally described in the complaint;

(c) The complaint is based solely upon information and belief.

2. There is no competent legal evidence of a requisition from the United States of Mexico to the United States of America for the surrender of the appellant.

3. No warrant has been issued for the arrest of the appellant within the United States of Mexico.

4. There is no competent and legal evidence that the appellant is the person against whom a warrant has been issued within the United States of Mexico.

5. There is no competent and legal proof that the appellant has committed the crime of embezzlement by a public officer or any other extraditable offence within the United States of Mexico.

6. There is no finding by the Magistrate of the commission of an extraditable crime by the appellant.

## ARGUMENT.

1. *The complaint and warrant upon which the appellant was arrested are fatally defective.*

(a) The complaint must allege the commission of an extraditable offence.

> "Whenever there is a treaty or convention for extradition * * * any justice of the Supreme Court, Circuit Judge, District Judge, Commissioner * * * may upon complaint made under oath charging any person found within the limits of any State, District or Territory *with having committed* within the jurisdiction of any such foreign government *any of the crimes* provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged * * *. If on such hearing he deems

the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same * * * and he shall issue his warrant for the commitment of the person so charged to the proper jail, etc." U. S. R. S., Sec. 5270.

The complaint alleges "that he is informed through diplomatic channel that one Mariano Fiamonte Fernandez * * * is duly and legally *charged* by the United States of Mexico with having in the City of Mexico within the United States of Mexico committed the crime of embezzlement or peculation of the public funds of the United States of Mexico between May, 1922, and February 1, 1923, while then and there a public officer of the United States of Mexico, to wit the Cashier of the Department of Special Taxes." (Record, p. 7.)

The complaint does not charge the respondent "with having committed * * * any of the crimes provided for by such treaty." It merely alleges that in Mexico he is charged with the commission of such a crime.

Extraditable crimes and offenses are defined in Articles I and II of the treaty between Mexico and the United States, ratified February 22, 1899. An extraditable crime within the scope of a treaty must be set up in the complaint, and probable cause to believe the respondent guilty of the crime must be proved at the hearing.

"The whole of the convention should be read together and in connection with Sec. 5270, Rev. Stat., which is applicable to all treaties. Under Sec. 5270 any one of the judicial officers named therein, may, upon complaint, *charging one of the crimes named in the treaty,* issue his warrant of arrest and hear the evidence of criminality. This done, his duty is, if he deems the evidence sufficient to hold the accused for extradition, to commit him to jail and to certify his conclusion, with the evidence, to the Secretary of State, who may then, 'upon the requisition

of the proper authorities of such foreign government, issue his warrant for the surrender of the accused'." *Charlton* vs. *Kelly*, 229 U. S. 463.

See also:
*Collins* vs. *Loisel*, 259 U. S. 309.
*In re Herskovitz*, 136 Fed. 713.
*Ex Parte Zentner*, 188 Fed. 344.

(b) The complaint is also defective because it does not fully and substantially inform the respondent of the offence with which he is charged. In particular, it fails utterly to inform the accused of the nature and amount of the property which he is alleged to have been charged with embezzling.

"The charge of murder sufficiently advises the petitioner of the offense that he is alleged to have committed, and it is sufficient to advise the court that it is an offense covered by the treaty. It is a common-law crime and needs no further definition as many statutory crimes like forgery, *embezzlement*, counterfeiting, etc., require." *Ex Parte* Dinhart, 188 Fed. 858.
See Loveland's Forms, 1862.

*State* vs. *Silverman*, 76 N. H. 309;
Constitution of the United States, Amendment VI;
Constitution of New Hampshire, Part First, Article 15.

(c) The complaint is based solely upon information and belief. The allegations are not sufficient in form to support a bill in equity. Whitehouse Equity, Sec. 105. A complaint based solely upon information and belief is bad. *Rice* vs. *Ames*, 180 U. S. 371; *U. S.* vs. Giles, 284 Fed. 208.

No facts appear in the record sufficient to cure this error. There was no evidence of criminality before the Court issuing the warrant, except the complaint. The case is therefore distinguishable upon the facts from *Yordi* vs. *Nolte*, 215 U. S. 227; and that case also establishes the insufficiency of the present complaint.

2. *Lack of Requisition.*

The complaint alleges (paragraph 3) that a formal requisition for the surrender of the appellant had been made by Mexico to the United States. No such requisition has been offered in evidence. Article VIII of the Treaty sets forth the essentials of a requisition.

3. *No warrant outstanding against the appellant in Mexico.*

The treaty is, under the Constitution, the supreme law of the land.

> 1 Moore on Extradition s. 82.
>
> "These (the status and the treaty are to be read and construed together; the treaty provisions being the later, of course control when the two are irreconcilable."
>
> *Ex Parte* Charlton, 185 Fed. 880, 887.
>
> "Of course, the effect of the supplementary treaty of 1884, being later than the statutory requirements above referred to, is to supersede the statute insofar as there is a necessary conflict in the carrying out of the extradition obligations between this country and Italy."
>
> *Charlton* vs. *Kelly*, 229 U. S. 447, 463.

If the provisions of the treaty are merely permissive, the procedure provided by statute may be followed. But when, as in this case, the treaty is later than the statute, and its provisions are obligatory, they necessarily control.

*Castro* vs. *DeUriarte*, 16 Fed. 93.

The treaty with Mexico contains an absolute requirement (*"must"*) that a copy of the warrant issued in Mexico for the arrest of the fugitive accompany the requisition.

Treaty, Article VIII.

The extradition statute (U. S. R. S., Sec. 5270) was adopted in 1848; the treaty was ratified in 1899.

There is no such warrant. The warrant accompanying the papers is against Mariano Viamonte. The fugitive whose arrest and extradition are demanded is Mariano Viamonte Fernandez.

The variance is fatal, and incurable by any evidence, whether extrinsic, or contained in accompanying papers.

*West* vs. *Cabell*, 153 U. S. 78, 85-7;
*Miller* vs. *Foley*, 28 Barb. (N. Y.) 630;
*Melvin* vs. *Fisher*, 8 N. H. 406;
*Clarke* vs. *Bragdon*, 37 N. H. 562, 565;
*Cooper* vs. *Texas*, 238 S. W. Rep. 658;
*State* vs. *Green*, 100 N. C. 547.

These authorities are also pertinent upon our request that the report (tabulation) of the witnesses Salazar and Perez (Record, opposite p. 38) be not considered as evidence in the case because relating to one Mariano Viamonte, and not to the appellant.

4. *No sufficient identification of the appellant.*

There is no evidence that the appellant is the person against whom an accusation of crime has been made in Mexico. Mere similarity of names is not sufficient to identify the appellant as the person whose extradition is demanded. There must be positive proof that he is the person charged with the crime.

*Ex Parte LaMantia,* 206 Fed. 330;
*Glucksman* vs. *Henkel,* 221 U. S. 508.

The testimony of the marshal (Record, p. 11) that the prisoner admitted that he was "Mr. Fernandez" and of another witness that he knew him in Mexico by the name of Mariano Viamonte Fernandez (Record, p. 12) is no proof that the person arrested is the Mariano Viamonte Fernandez who occupied the position of Cashier of the Department of Special Taxes in Mexico.

5. *No competent evidence of embezzlement.*

The evidence in the case at the most merely demonstrates that upon the records of divers departments there may be somewhere a shortage, either of cash or of "cash virtual." There is no evidence of the taking of any cash by the appellant.

Even where the books were kept and the money handled by the respondent it has been held that such proof is not sufficient to establish an embezzlement.

> "And the presiding judge ruled as requested by the defendant that the evidence presented by the books would not in itself amount to an embezzlement or alone warrant a conviction." *Commonwealth* vs. *Bennett,* 118 Mass. 453.

The burden rests upon the prosecution to establish "good reason to believe that the crime alleged has been committed by the person charged with having committed it." *Ornelas* vs. *Ruiz,* 161 U. S. 512.

The treaty requires such evidence of criminality as under the laws of New Hampshire would warrant the arrest and commitment for trial of the petitioner.

Treaty, Article III.

The evidence must be competent legal evidence under the laws of this State, in point of substance.

"It was not the function of the committing magistrate to determine whether Collins was guilty but merely whether there was *competent legal evidence* which, according to the law of Louisiana, would justify his apprehension and commitment for trial if the crime had been committed in that State." *Collins* vs. *Loisel*, 259 U. S. 309.

See also:

*Ornelas* vs. *Ruiz*, 161 U. S. 502, 508, 512;

*Benson* vs. *McMahon*, 127 U. S. 459, 463;

*Bryant* vs. *U. S.*, 167 U. S. 104;

*Elias* vs. *Ramirez*, 215 U. S. 398.

Hearsay is not such evidence.

*Ex Parte Fudera*, 162 Fed. 591; affirmed, without opinion, in 219 U. S. 589.

See also *Ex Parte La Mantia*, 206 Fed. 330; *In re Geissler*, 196 Fed. 168.

Nor is opinion evidence based on hearsay or other incompetent matter. Both should be disregarded.

*Ex Parte Zentner*, 188 Fed. 344.

The following portions of the depositions and accompanying documents are not competent legal evidence, being obviously hearsay or opinion evidence, and should be disregarded.

Minutes of the meeting in the Department of Special Taxes (Record, p. 25), the following words:

"for the purpose of confirming the deficits of the Cashier Mariano Viamonte Fernandez and which according to the report given to Mr. Benjamin Marin, first undersecretary of the Treasury Department, by Mr. J. Icaza, on the twenty-sixth of March, of this year, amounts to $137,387.61—one hundred and thirty-seven thousand, three hundred and eighty-seven Pesos, sixty-one cents, National gold. The preceding amount arises from the collection of taxes that were collected in the Cash Department, in his charge, and which he detracted in cash; making the egress apparent by means of receipts from the Gen-

eral Treasury of the nation for entries of taxes paid by several oil companies to said office, which documents he was to hold only until the manifestations were stamped. Taking as a basis the enclosures sent with his report by Mr. Icaza, and in which there is a separation of the operations in cash from the ones merely virtual, we reach the conclusion that Cashier Mariano Viamonte Fernandez disposed of the sum above mentioned."

Deposition of Luis A. Herrera (Record, pp. 27-8), the following words:

"the declarant also states that as he was in the Cash Department of Special Taxes, a subdivision of the Treasury Department, drawing up the document that has just been read to him, Mr. Evaristo Aznar told him that after the departure of Cashier Viamonte he, Mr. Aznar, had by certain comparisons which he made in the books suspected that there had been mismanagement on the part of said Viamonte, and as he had advised his Superiors of it, this had, undoubtedly, given rise to the inspection carried out by Mr. Icaza."

Same (Record, p. 28), the following words:

"this being very suspicious, for Mr. Viamonte's bad managements, judging by Mr. Icaza's report, began in the month of May last year, and Mr. Palencia's inspections are comprised within the month of May referred to, and extend as far as January of this year. That he explains this statement by saying that he does not suspect Mr. Palencia, but deduces that on making his inspections of Viamonte, he did not go deeply into the management of the affairs he was inspecting, and therefore he did not set them down in his report."

Deposition of Evaristo Aznar (Record, p. 29), the following words:

"That the mismanagement of funds on the part of Viamonte Fernandez consists in the fact that he, in his character of Cashier of the Department, already mentioned, cleared accounts with Collector Arturo Pozada, giving him as the amount paid in for petroleum a greater amount than actually was received from that industry. That said deponent could not have evidence of this mismanagement, because when he asked Viamonte Fernandez for the documents to make the monthly account which is given to the Controllership, said Viamonte Fernandez stated to him that he would personally deliver the documents concerning petroleum to the Controllership, wherefor the accounts submitted to said Department lacked the aforementioned proof of which the office of the Auditor of the Annotation of Stamps already had knowledge."

Same (Record, p. 29), the following words:

"That it is true, as stated by Mr. Herrera, that the deponent after the departure of Viamonte, upon comparing the payments in cash to the General Treasury with the actual cash ingress, he noted various irregularities, of which he immediately advised the Treasury Department."

Deposition of J. Icaza (Record, p. 30), the following words:

"and after eighteen days of careful inspection he came to the conclusion that an embezzlement had been committed by the Ex-Cashier Mariano Viamonte Fernandez, in the sum which is indicated in the report which had just been read to him; that for this reason he submitted a detailed report to the Sub-Secretary of the Treasury, keeping for himself a copy of the same which he will exhibit in this Court; that in it are specified in detail all and each of the irregularities committed by Viamonte Fernandez which irregularities constitute a mismanagement of funds."

The Decision of the Expert Auditors Salazar and Perez, the following words:

> "In compliance with what was ordered by the Controller General of the Nation, in his instructions numbers 22/96 and 22.97, dated the eighth of this month, to state our opinion on the amount of the responsibilities resulting against Mariano Viamonte, ex-Cashier of the Cash Department of Special Taxes of the Treasury Department, we have the honor to inform you that: the undersigned, having made a scrupulous investigation of the operations that appear in the statement of the process, added to the corresponding file of that Court, in your charge, as well as from those carried out by the Audit of this Department, in view of the accounts rendered by said Viamonte and of the documents added to the same, we obtained the sum of $137,390.01, one hundred and thirty-seven thousand, three hundred and ninety Pesos, one cent, as the total amount of the difference that appear against him, according to the details of this statement we inclose herewith."

Report of Jesus Icaza (Record, p. 41), the following words:

> "But in the following months there are found irregularities, although they apparently cover the operations, it develops that with documents paid by the petroleum companies to the general treasury of the nation which documents are sent to the Treasury of Special Taxes, in order to cover entries the Cashier entered as paid out various amounts, taking the money in cash."

Same (Record, p. 41), the following words:

> "And some of these documents are the ones which the Cashier used for his benefit to make it appear on the books that he was paying out money in cash."

And the following:

"for the purpose of identifying the documents which the Cashier used in order to give apparent balance to his books."

Same (Record, pp. 41-2), the following words:

"corresponding to the months in which the Cashier took amounts in cash and which give the following amounts:—

| | |
|---|---|
| May, 1922 | $1,000.47 |
| June, 1922 | 1,399.70 |
| August, 1922 | 1,721.69 |
| September, 1922 | 5,326.47 |
| October, 1922 | 8,875.66 |
| November, 1922 | 6,818.41 |
| December, 1922 | 52,713.00 |
| January, 1923 | 59,532.21 |
| Total | $137,387.61 |

"One hundred thirty-seven thousand, three hundred eighty-seven Pesos, sixty-one cents.

"The above amount was that which the Treasurer took from the Cash Department of the Department of Special Taxes in varying amounts."

Same (Record, pp. 42-3), the following words:

"In the Cash Department of the Department of Special Taxes there exist receipts in full in favor of several petroleum companies in the amount of $548,-407.78, five hundred forty-eight thousand, four hundred seven Pesos, seventy-eight cents, which were probably retained by the Cashier, in order to continue operating with them as he had done."

Declaration of Benjamin Marin (Record, p. 166), the following words:

"that the exponent is not personally aware of the fact, though he has heard that other persons are certain of the fact referred to."

And the following words:

"but the employees appointed by the Treasury Department to revise the books have informed him on that particular, that is, in regard to the facts referred to in the question. To the ninth: that it is so, with the explanation of the preceding question."

Declaration of Evaristo Aznar (Record, p. 167), the following words:

"To the fifth: that it is true, for this was proven by the declarations of the employees of the Mining Companies 'Metalurgica Mexicana' and 'American Smelting and Refining Company,' the names of said employees being: Montes and Peace. * * * that Mr. Alberto Mijangos, who works in an establishment where pianos are sold, situated in the Guardiola Building on Francisco I. Madero Avenue, informed the exponent that one or two days before Viamonte Fernandez left this City, as he, Viamonte, was in the evening talking to said Mr. Mijangos, he asked the latter if he had seen the one thousand dollar bills, showing him then a roll of said notes, which Mr. Mijangos believes to have amounted to fifty bills."

Declaration of Javier Robles (Record, p. 168), the following words:

"To the fifth: that it is true, the exponent having knowledge of it through some employees of Mining and Oil Companies, from whom Viamonte Fernandez exacted the checks to be issued to his favor."

Deposition of E. Robles (Record, p. 171), the following words:

"That as the result of such examination and revision it was thereupon discovered for the first time that there was a shortage in the accounts of the said Viamonte y Fernandez in the sum of $137,387.61 Oro Nacional, money of the United States of Mexico."

As to Icaza's report in its entirety, it is merely a communication which passed from him to another officer of the government, of a testimonial character no higher than that of a letter or an oral communication. He says in his deposition (Record, p. 30) that he came to the conclusion that there was an embezzlement (obviously incompetent) and "for this reason he submitted a detailed report," and he declares "that in it are specified in detail all and each of the irregularities committed by Viamonte Fernandez which irregularities constitute a mismanagement of funds."

This statement is clearly incompetent, and if competent would not be a sufficient verification of the report to entitle it to be received in evidence. And beyond this there is nothing. There was a mistake in the description of the person to whom the report was addressed. To correct this, the prosecuting attorney asked that Icaza be again summoned "so that he may state if he acknowledges as being the same report that he rendered to the Department of Special Taxes, the one exhibited by the undersigned and which was sent to him by the Chief of the Department." (Petition of Prosecuting Attorney, Record, p. 33.) He appeared and identified the report exhibited as being the same to which previous reference had been made; and that is all.

There is outside the report itself nothing to indicate upon what it is based,—no statement that it is a summary of the transactions as disclosed by the books kept by Fernandez, no declaration whatever that it is a true

statement of anything, nothing to verify it so as to make it competent evidence, or in any way to raise it above the level of pure hearsay. It is merely a letter which he wrote to another official telling of some conclusions which he had reached.

And the report becomes doubly incompetent when it is itself examined, because it clearly appears that it is not based solely upon the books kept by Fernandez, that those books were inadequate for the purpose of his inquiry, and that it was necessary for him to identify "documents" (Record, p. 41) not in Fernandez' keeping,—the only documents appearing to be in his office were receipts amounting to $548,407.78 (Record, p. 42),—and also to examine "entries in the diary; reports of production and exportation of petroleum, reports of petroleum." Record, p. 41.) For this material he had to go to the books of other departments; and there is nothing to show who kept these books, what were the sources of their information, nor anything to make their contents *"competent legal evidence."*

What he did was to go through Fernandez' books, and then to assume to check up the transactions there recorded by what are claimed to be the *facts* as disclosed by the records in other offices.

For the evidence, including Icaza's report, clearly shows that Fernandez had nothing to do with "reports of petroleum" or "reports of production and exportation of petroleum." All that he did as to petroleum was to take, from the companies, treasury receipts for sums paid into the treasury on account of petroleum taxes, have the proper stamps affixed, and return them stamped.

His accounts cannot be proved incorrect by checking them with some other accounts which are not proved to be correct. As to the other accounts there is no proof.

The whole report is absolutely incompetent, both for

lack of verification as to its competent portions, and also for lack of proof that the accounts and documents by which Fernandez' books were checked were themselves authentic.

To restate the argument,—Fernandez' accounts balanced. They were audited monthly, and always found to balance. They furnish no evidence whatever of an embezzlement. If it can be inferred from them that he received more cash than he paid out,—that there was a shortage of cash,—that is not evidence of embezzlement; it may be due to carelessness or inaccurate book-keeping, or the fault of some other person. The conclusion of fraud on his part is drawn, and drawn solely from a comparison of his accounts with the records of petroleum production and accounts regarding petroleum in other departments of the government, none of which are in any way verified so as to make them competent as evidence of the falsity of his accounts.

Similar considerations apply to the report (tabulation) of Salazar and Perez. (Record, opposite p. 38.) Not only is it described as a report of charges against "Mariano Viamonte," but the results are described as obtained "from the investigation carried out by the undersigned for proof in the case, in the possession of the First Supernumerary District Court and the accounts annotated by the Department of Comptrollership, by which is referred to the movement which obtained in the branch of petroleum."

It thus appears that to get the "differences * * * charged against Mariano Viamonte" they were obliged to go into the accounts of the Department of Comptrollership, which are in no wise verified. The first column of the tabulation, after the names of the companies, is "The Amount of Declarations Presented." But, as clearly appears, the declarations were presented to the Treasury,

where of course account was kept of them. There is no proof that the figures in this column are a correct transcript of the records in the treasury or that those records were correctly kept.

The whole case, on these two reports, is that the accounts of Fernandez differ from unidentified accounts in some other departments; those other accounts are *assumed* to be correct, without proof; therefore the accounts of Fernandez must be wrong.

The two reports are absolutely incompetent, in their entirety.

The report of Icaza assumes to show that more cash was received in Fernandez' department than was paid out. That of course is not evidence of embezzlement, by Fernandez or by any one else. Icaza tries to explain the shortage by a check of petroleum accounts (in connection with which Fernandez handled no cash), comparing the figures on Fernandez' books with those on the books of other departments, which books are in no way verified, nor even identified. And the whole thing is merely in the form of a letter which he wrote to another official, and which he nowhere testifies to as containing a correct report of the results of his examination of Fernandez' books, so far as it relates to those books. The whole report is clearly incompetent.

The report of Salazar and Perez rests upon the same foundation, being a check of Fernandez' accounts relating to oil transactions (involving no cash) by the figures relating to the same transactions as disclosed by the unverified and unidentified books of other departments. This report also is entirely incompetent.

The report of Icaza alone claims to show even any shortage of cash in Fernandez' office. Eliminating that report, there is no such evidence in the case.

But shortage of cash is not presumptive evidence of criminality in this country, whatever it may be in Mexico. The presumption is of innocence. To prove criminality it was necessary to go further, and show that the shortage of cash was covered by false entries in relation to petroleum transactions. This could not be proved by Fernandez' books. For proof it was necessary to go outside, to determine whether the petroleum transactions were in fact as reported on his books. Both Icaza, and Salzada and Perez, say that they did go outside and examine other accounts, and found that they did not agree with those of Fernandez. This is offered as proof that Fernandez' entries were false. But there is no proof that the other accounts were correct. They may have been incorrectly kept, or deliberately falsified.

The objection is not to the form of the proof, but to its substance; evidence that his books did not agree with other unidentified and unverified books is not, in New Hampshire, or anywhere in the United States of America," *"competent legal evidence"* of his guilt.

A careful analysis of the record, even assuming all the evidence to be competent, will disclose (1) that there is no satisfactory evidence of a shortage in cash; and (2) that if a shortage exists there is no evidence that Fernandez took the money. The whole case against Fernandez proceeds upon the assumption that he is responsible for all taxes entrusted for collection to the cashier of the Department of Special Taxes. No distinction is made between defalcation and mere failure to collect. The so-called warrant recites that "said Viamonte was detracting amounting in total to $137,387.61, without taking into account some demands due that may exist against oil companies which have not been collected." (Record, p. 23.)

In the report of Icaza we have again the same curious claim of responsibility for uncollected taxes. It is there stated "but there may exist demands for collection against the petroleum companies, which have not been collected, and which it may turn out he may be found responsible for, and it is the duty of the Department of Special Taxes to clarify this situation, which it was impossible for me to do since I lacked copies of the above-mentioned demands." (Record, p. 42.)

It is clearly established that the cashier of special taxes did not collect or in any way receive the petroleum tax money. This was paid into the general treasury, and the receipts showing the payment were alone taken to the Department of Special Taxes. A provisional receipt was issued by the Department of Special Taxes while the original receipt was sent to another department to be stamped. (Record, p. 41.) The cashier could not embezzle the moneys accruing from the petroleum taxes, because he did not receive these moneys. The Department of Special Taxes did have certain stamps for minor special taxes, and these stamps were issued for cash. The cash accruing from this source represented the sole cash income of his department. It appears that the accounts of this department were audited monthly. The particularity with which this audit was made is disclosed through the settlement made by the cashier upon his retirement from office. (Record, pp. 30-31.) Inasmuch as stamps must issue for all cash received, the monthly audits afforded a very complete check upon this department, and there was no opportunity for embezzlement unless with the collusion of the inspector. And it appeared from the evidence that the inspector Leopoldo Palencia was not suspected of any misconduct in the discharge of his duties. (Record, p. 28.) The complete check upon the cash through the balancing of stamps

against cash makes these monthly audits conclusive evidence that there was no embezzlement.

It is true that Icaza in his report speaks of a cash shortage. But he also admits that it was not possible from the records of the Department of Special Taxes to separate the cash virtual, *i. e.*, petroleum manifests, from the income in cash. He states:

> "This work was delayed and laborious because the current entries in the books give no explanation since for outgo in the Cash Department there was an entry which said only:—'Transfer of funds to the general treasury of the nation'." (Record, p. 41.)

This transfer of funds included both cash and the oil manifests which were treated as the equivalent of cash. In this situation Icaza has by examining the records of various departments discovered discrepancies from which he claims that there was a cash shortage. These discrepancies arise solely upon a comparison of the oil declarations with the manifests and the payments to the General Treasury. The irregularities in these documents do not tend to prove an embezzlement in the Department of Special Taxes. If there was an embezzlement of the petroleum tax money it must have occurred in some other department, because none of this money reached the Department of Special Taxes. The report of Icaza does not attempt to state the total cash receipts or disbursements for the period covered. It is involved, intricate and inconclusive. The claim of a cash shortage is an arbitrary deduction unsupported by records of the Department of Special Taxes.

For some reason, not clear if Icaza's report was satisfactory, two auditors were appointed to investigate the alleged shortage. These auditors Salazar and Perez do not refer to the shortage as an embezzlement. They

state "we obtained the sum of $137,390.01, one hundred and thirty-seven thousand, three hundred and ninety Pesos, one cent, as the total amount of the differences that appear against him, according to the details of the statement we inclose herewith. We deem it prudent to state that besides the sum already mentioned, *other liabilities* might appear against the said Ex-Cashier, *because according to the account by him, he failed to collect several sums from some Oil Companies,* the amount of which Viamonte himself nullified on the demands of the Treasury Department pertaining to them, by simple circles made with a pencil, without having sent the proper explanatory notes, and in which it should be stated why proper collection was not duly made; but the amount of them will not be known, until the situation be properly clarified by the Committee appointed for that purpose by the Treasury Department. (Record, pp. 36-7.)

Here again we have the claim that the cashier is responsible for mere failure to collect taxes entrusted to his supervision. He may of course be civilly responsible under the laws of Mexico for such failure. His bondsmen may also be liable, but mere failure to collect does not constitute the crime of embezzlement. And seemingly all the shortage that is claimed against the cashier arises from failure to collect.

The special report of Salazar and Perez does not purport to have been made from an examination of the accounts in the Department of Special Taxes. Instead it deals wholly with oil declarations, invoices formulated and various other items all relating to the petroleum taxes. No effort is made to compare the cash receipts and cash disbursements of the Department of Special Taxes. The alleged shortage shown by this report arises wholly out of differences between declarations, invoices and payments to the general treasury, all matters in respect to

which the Department of Special Taxes received and disbursed no cash.

This report does not claim that there is a shortage in money It states that there are "differences chargeable to him" and that these differences arise upon a comparison of documents and records all relating to the petroleum taxes. The discrepancy in these records cannot prove a cash shortage in the Department of Special Taxes because, as we have repeatedly stated, no cash from these transactions ever came into that Department. This difference must arise from such errors as a duplication of declarations or manifests or mere failure to collect or perhaps an embezzlement in some other department. The cashier's "responsibility" for mere failure to collect is again clearly stated in that portion of the evidence of Salazar and Perez above quoted. And it apepars that to the liability found against the cashier there would have been added "other liabilities" "because according to the account rendered by him he failed to collect certain sums from some oil companies," if the "demands" had not been nullified by "simple circles made with a pencil."

The testimony and report of Salazar and Perez establish (1) that errors arise in the oil declarations and manifests which the cashier of the Department of Special Taxes is required to correct; (2) that the cashier is held prima facie responsible for the non-payment of these taxes, *i. e.*, failure to collect; and (3) that the alleged difference arises out of the collection or non-collection of the petroleum taxes. And since the cashier did not receive any money from the petroleum taxes it follows that the alleged difference could not be an embezzlement. An embezzlement can exist only if the cashier took the money of the Mexican Republic and fraudulently converted it to his own use.

The report and evidence of Salazar and Perez conclusively establish that no embezzlement has occurred in the Department of Special Taxes. And their findings are corroborated by the monthly audits made by the inspector Palancia, whose integrity is not questioned.

But even if it be assumed that a cash shortage existed in the Department of Special Taxes, there is no evidence connecting the cashier with that shortage. There were various employees in this department, including one Aznar, who has succeeded to the office of cashier. He is particularly malevolent in his utterances against the former cashier, but he states nothing but suspicion. If there is a shortage in cash the proof does not establish that it was taken by the cashier rather than the assistant cashier or some other employee of the department. The cashier of a bank would not be held guilty of embezzlement merely because of a shortage of funds in his bank. There must be proof that he took the money and converted it to his own use. The same principles apply to the present case. Evidence merely tending to prove a shortage in cash in the Department of Special Taxes is insufficient to establish an embezzlement by the cashier. There must also be evidence that he took the money. This evidence is wholly lacking.

6. *No finding by the Magistrate of the Commission of an extraditable crime.*

The Commissioner has not found that there is probable cause to believe that Fernandez is guilty of an extraditable offense. The material findings of the Commissioner are as follows,—it appearing to me that the offense alleged in said complaint had been committed and probable cause being shown to believe that said respondent had committed said offense, etc." (Record, p. 13.) There is no extraditable offense alleged in the com-

plaint. The complaint merely alleges that the respondent has in Mexico been charged with a crime; there is no allegation that he has committed a crime. The finding that a person has been charged in a foreign country with the commission of a crime, however great the offense charged, is not sufficient to warrant extradition. And that is all that the finding of the Magistrate amounts to; the question whether the accused had committed a crime was not before him.

Respectfully submitted,

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